THE POWER OF CONGRESS TO LEVY TAXES FOR PURPOSES OF REGULATION. — Though the interpretation of the clause of the Constitution which gives Congress the power to levy taxes has been the subject of much discussion, a recent article deals with an aspect of the question on which there is comparatively little authority. *May Congress Levy Money Exactions, Designated "Taxes," Solely for the Purpose of Destruction?* by John Barker Waite, 6 Mich. L. Rev. 277 (February, 1908). The author bases his discussion on the case of McCray *v.* United States,[1] in which it was contended that a tax[2] on oleomargarine colored to resemble butter was invalid because, while on its face the act was an exercise of the power to raise revenue, its enforcement would in fact destroy or materially restrict the manufacture of artificially colored oleomargarine. The court, influenced somewhat, it would seem, by the fact that it considered the imposition a valid exercise of the police power,[3] held that the taxing power was unlimited save as expressly stated in the Constitution, and that "if a tax be within the lawful power, the exertion of that power cannot be judicially restrained because of the results to arise from its exercise."[4] If this reasoning is carried to its logical conclusion the agitation for state action in regard to patent medicines and for the proposed law prohibiting the interstate transportation of the products of child labor is uncalled for, since Congress can control these matters by prohibitive impositions in the form of taxes. Mr. Waite, however, ably contends that though the taxing power of Congress is broad, the Constitution does not give Congress "a power of control, as such, by money exactions, over affairs whereof jurisdiction is not otherwise conferred." There is, he argues, a difference between impositions for revenue and impositions for regulation, and the latter, properly speaking, are not taxes. Accordingly regulations of internal affairs are not within the power of Congress, since there is no express grant of such power in the Constitution. It is true that the courts have sustained[5] a so-called tax clearly intended to drive out of circulation the notes of state banks, and that prohibitory duties on imports are considered constitutional. But the imposition on the state bank notes was valid under the express power to regulate the national currency, and the prohibitory duties may be regarded as an exercise of the power to regulate commerce. There seems to be no square decision, therefore, in support of the proposition that Congress was granted power to levy money exactions for purposes of regulation, and the author concludes that the act considered in the case of McCray *v.* United States was an abuse of congressional power.

This conclusion seems eminently sound. But it raises a further question, not considered by Mr. Waite, — whether it is within the power of the courts to determine the validity of an imposition from its effect as a tax or as a regulation, or whether an imposition for the purpose of regulation is an instance of "unconstitutional action by the representatives of the people which can be reached only through the ballot-box."[6] On this question there seems to be no direct authority. An analogy, however, may be found in the general rule that under the police power the validity of an act may not be questioned in the absence of anything on its face which within the court's judicial knowledge is unwarranted.[7] Similarly, while it is settled that taxation must be for public purposes,[8] the absence of all possible public interest must be clear before the courts will declare the act invalid,[9] and it is said that the "interest, wisdom and justice of the representative body furnish the only security, where there is no express contract, against unjust and excessive taxation."[10] These decisions show the

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[1] 195 U. S. 27.
[2] 32 Stat. at L. 193.
[3] McCray *v.* United States, 195 U. S. 27, 63.
[4] McCray *v.* United States, *supra*, 59.
[5] Veazie Bank *v.* Fenno, 8 Wall. (U. S.) 533.
[6] Cooley, Const. Lim., 7 ed., 697.
[7] Powell *v.* Pennsylvania, 127 U. S. 678; 17 HARV. L. REV. 269.
[8] Cole *v.* La Grange, 113 U. S. 1.
[9] City of Minneapolis *v.* Janney, 86 Minn. 111.
[10] See Bank *v.* Billings, 4 Pet. (U. S.) 514, 563; 21 HARV. L. REV. 277.

tendency of the courts to consider that "it is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will embodied in statutes as they may happen to approve or disapprove its determination of such questions." [11] Applying these principles it would seem that theoretically an imposition for purposes of regulation is unconstitutional, but that as a matter of practice the courts will be slow to hold such impositions invalid.

The magazine which has been known heretofore as the American Law Register appeared in January, 1908, as The University of Pennsylvania Law Review. In future it will be referred to in these columns as U. P. L. Rev.

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VESTED AND CONTINGENT FUTURE INTERESTS IN ILLINOIS. *Albert Martin Kales.* Analyzing the cases where the classes of interests are distinguished and showing the present confusion in Illinois. 2 Ill. L. Rev. 301.

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[11] Powell *v.* Pennsylvania, *supra,* 685.